Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

35

No. 99-1257

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF FOR THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ARTHUR ANDERSEN LLP, DELOITTE & TOUCHE LLP, AND KPMG LLP AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
MARK A. PERRY
BRIAN C. GOEBEL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

September 11, 2000

BEST AVAILABLE COPY

24 pp

QUESTION PRESENTED

Whether, under the nondelegation doctrine, an agency's authority to make significant policy decisions, such as those imposing substantial regulatory compliance costs on a profession or industry, subjecting it to unprecedented federal regulation, or curtailing constitutionally protected liberties, must be grounded upon a clear statement by Congress that it has delegated such authority to the agency.

TABLE OF CONTENTS

QUESTION PRESENTED..... i
TABLE OF AUTHORITIES..... iv
INTEREST OF AMICI CURIAE..... 1
STATEMENT..... 3
SUMMARY OF ARGUMENT..... 4
ARGUMENT..... 5
CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 6

American Trucking Ass'ns, Inc. v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999) ..... *passim*

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 11

EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 12

FDA v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) 15, 17

FPC v. *New England Power Co.*, 415 U.S. 345 (1974) 9

Garcia v. *San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985) 13

Greene v. *McElroy*, 360 U.S. 474 (1959) 8

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 11, 13

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 448 U.S. 607 (1980) ..... *passim*

International Union, UAW v. *OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) 4

Kent v. *Dulles*, 357 U.S. 116 (1958) 8, 12

Landgraf v. *USI Film Products*, 511 U.S. 244 (1994) 12

MCI Telecommunications Corp. v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994) 14, 15, 17

Mistretta v. *United States*, 488 U.S. 361 (1989) 6, 14

National Cable Television Ass'n, Inc. v. *United States*, 415 U.S. 336 (1974) 9, 10, 17

Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935) 5, 6

Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 7, 9

United States v. *Bass*, 404 U.S. 336 (1971) 11

Constitution, Statutes and Regulations

U.S. Const. Art. I, § 1 5

42 U.S.C. § 7408 3

42 U.S.C. § 7409 ..... 3, 18

62 Fed. Reg. 38,652 (1997) 3

62 Fed. Reg. 38,856 (1997) 3

65 Fed. Reg. 43,148 (2000) 2, 16, 17, 18

Other Authorities

Tribe, *American Constitutional Law* (2d ed. 1988) 13

IN THE

Supreme Court of the United States

No. 99-1257

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF FOR THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ARTHUR ANDERSEN LLP, DELOITTE & TOUCHE LLP, AND KPMG LLP AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

The American Institute of Certified Public Accountants is the national professional organization for all Certified Public Accountants. Its mission is to provide members with the resources, information, and leadership that enable them to provide valuable services in the

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief in letters that have been lodged with the Clerk.

highest professional manner to benefit the public as well as employers and clients. In fulfilling its mission, the AICPA works with state CPA organizations and gives priority to those areas where public reliance on CPA skills is most significant.

Arthur Andersen LLP is one of the "Big 5" accounting firms, with more than 70,000 employees in 83 countries. Arthur Andersen's mission is to build relationships and develop innovative solutions to help dynamic people and organizations create and realize value. Deloitte & Touche LLP, another Big 5 firm, is part of Deloitte Touche Tohmatsu, one of the world's leading professional services firms, with more than 90,000 people in over 130 countries. Deloitte & Touche creates solutions to business problems based on a thorough grasp of each client's needs. KPMG LLP, also a Big 5 accounting firm, is the U.S. member of KPMG International, which has more than 100,000 professionals in member firms in 159 countries. KPMG helps clients successfully respond to changing opportunities by providing professional services that enhance operational and financial performance.

Amici curiae are confronted with a rulemaking proceeding by the Securities and Exchange Commission that has the potential to work fundamental changes in the accounting profession by introducing new and sweeping federal regulation of professional services firms. *See* 65 Fed. Reg. 43,148 (2000). This rulemaking raises issues under the nondelegation doctrine that parallel those in this case. *Amici* have a vital and enduring interest in ensuring that federal administrative agencies do not exceed the authority constitutionally delegated to them by Congress.

STATEMENT

The Clean Air Act ("CAA") requires the Environmental Protection Agency ("EPA") to promulgate and periodically revise national ambient air quality standards for certain pollutants. *See* 42 U.S.C. §§ 7408-09. For each pollutant, the EPA sets a primary and secondary standard. *See* § 7409(b). In 1997, the EPA issued final rules revising the primary and secondary standards for ozone and particulate matter ("PM"). *See* 62 Fed. Reg. 38,652 (1997); 62 Fed. Reg. 38,856 (1997). Numerous petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit challenging the validity of the final rules. *See American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999). These petitioners charged, *inter alia*, that the authority claimed by the EPA under the CAA is inconsistent with the Court's nondelegation doctrine and the separation of powers principles that it preserves.

The court of appeals concluded that the EPA's construction of the CAA violated the nondelegation doctrine because the agency failed to articulate an intelligible principle "to channel its application" of the statutory factors it was required to consider when revising the primary and secondary standards for ozone and PM. *Id.* at 1034. The court of appeals did not strike down the CAA as unconstitutional, but rather held that the air quality standards could not be enforced and remanded the matter to the EPA to develop an interpretation of the CAA that would confine its discretion within constitutional bounds when setting air quality standards. *See id.* at 1038.

In reaching the issue of whether the EPA's interpretation of the CAA violated the nondelegation doctrine,

the court of appeals did not apply its previous teaching that, under the nondelegation doctrine, federal courts "require a clear statement by Congress that it intended to test the constitutional waters" in cases involving broad delegations of policymaking authority to administrative agencies. *See International Union, UAW* v. *OSHA*, 938 F.2d 1310, 1316-17 (D.C. Cir. 1991). The court of appeals did not rely on this clear statement rule even though it found that the "latitude [claimed by the] EPA . . . [was] seem[ingly] even broader than that OSHA asserted in *International Union*" and provided the EPA with the authority to "send industry not just to the brink of ruin but hurtling over it." 175 F.3d at 1037. Application of the clear statement rule in this case would have provided an alternative ground to reach the same result, while avoiding the difficult constitutional question that the court of appeals addressed pursuant to the nondelegation doctrine.

SUMMARY OF ARGUMENT

The Court should explicitly incorporate a clear statement requirement into the nondelegation doctrine as a constitutionally required check on sweeping assertions of power by federal agencies—including the Securities and Exchange Commission, which is attempting to assert unprecedented power to regulate *amici* and the entire accounting profession.

The Court should adopt a clear statement requirement as an aspect of judicial scrutiny of agency rulemaking pursuant to the nondelegation doctrine for at least three reasons. *First*, the Court has invoked clear statement principles in previous cases involving the nondelegation doctrine. Those principles further the policies underlying the nondelegation doctrine as well as

the judicial practice of deciding constitutional issues only when it is necessary to do so. The reasoning of the Court's prior decisions suggests that a clear statement rule should be expressly incorporated into the nondelegation doctrine. *Second*, the concerns that have led the Court to impose clear statement rules in other legal contexts are also present in cases involving agency claims of broad policymaking authority. Accordingly, the Court should incorporate a clear statement rule into the nondelegation doctrine to address these concerns. *Third*, given the limits of judicial review inherent in the traditional nondelegation doctrine, adopting a clear statement rule as part of that doctrine would further the separation of powers principles underlying the doctrine and would be instrumental in constraining agency behavior. Application of such a clear statement rule requires that the EPA's action in this case be invalidated and the court of appeals' decision be affirmed.

ARGUMENT

Under the separation of powers principles enshrined in the Constitution, the legislative power is assigned to Congress rather than the executive or the judiciary. U.S. Const. Art. I, § 1; *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 675 (1980) ("*Benzene*") (Rehnquist, J., concurring). As a result, it has long been settled that "Congress . . . is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935).

At the same time, the "Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and es-

tablishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." *Ibid.*; *see also Benzene*, 448 U.S. at 675 (Rehnquist, J., concurring) (stating that "common sense" and "necessit[y]" dictate that Congress must be able to "lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases").

When confronted with a claim that Congress has impermissibly delegated its legislative authority to an administrative agency, the Court has traditionally reviewed the statutory text and context, as well as any applicable legislative history, to determine if there is an "intelligible principle" that confines the agency's discretion and to which the agency must conform when exercising the authority ostensibly granted to it by Congress. *See Benzene*, 448 U.S. at 675-76 (Rehnquist, J., concurring); *Panama Refining*, 293 US. at 429-30. In the absence of such an intelligible principle, a statute constitutes an impermissible delegation of legislative power if it allows the agency rather than Congress to set national policy. *See, e.g., A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. at 433.

This judicial scrutiny of the permissible parameters of agency policymaking authority is referred to as the "nondelegation doctrine." *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989) (noting that the Court has also relied on the policies underlying the nondelegation doctrine to give "narrow[ing] constructions to [broad] statutory delegations"). This case provides the Court

with an opportunity to refine the contours of the nondelegation doctrine. The Court should use this opportunity to adopt a clear statement rule—a requirement that certain assertions of agency authority be based on a clear delegation of that authority by Congress—as part of that doctrine. In particular, a clear congressional statement should be required to sustain an agency's authority to make a variety of significant policy decisions, such as those imposing highly burdensome regulatory compliance costs on an industry or profession, subjecting an entire industry or profession to unprecedented federal regulation, or curtailing constitutionally protected liberties.[2]

1. To further the policies underlying the nondelegation doctrine, the Court has relied on clear statement principles in previous cases involving the scope of an

---

[2] The adoption of such a clear statement requirement does not mean that the Court should abandon judicial review of congressional delegations of policymaking authority. If Congress has clearly intended to give an agency policymaking authority on a significant issue, then the Court should engage in its traditional nondelegation doctrine analysis. *See Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (stating that even when Congress clearly intends to delegate certain authority to an agency, "any such delegation must also meet the normal requirements of the nondelegation doctrine"). Applying that traditional framework, the Court should carefully review the federal legislation to determine whether Congress has provided the agency with discernable limits on the scope of its delegated authority and, if it has not, whether the absence of such limits is nevertheless justified as a matter of necessity. If the lack of an intelligible principle is not the result of some necessity, then the legislation is unconstitutional. *See Benzene*, 448 U.S. at 671-88 (Rehnquist, J., concurring) (discussing the Court's traditional nondelegation analysis).

agency's authority. The reasoning of these cases suggests that a clear statement rule should be utilized in all nondelegation doctrine cases involving significant policy decisions by agencies.

a. The Court has held that agencies do not have the authority to promulgate regulations curtailing constitutionally protected liberties absent a clear statement by Congress delegating that authority to the agencies. *See Greene* v. *McElroy*, 360 U.S. 474 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958). These decisions are based, in part, on the principle that the Court should avoid deciding constitutional questions when it is possible to do so. *See Kent*, 357 U.S. at 130 ("We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.").

These decisions are also based on the separation of powers principles underlying the nondelegation doctrine. In *Greene*, the Court held that a delegation of authority to impede the exercise of a constitutional right "must be made explicitly . . . because [this type of government] action . . . requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene*, 360 U.S. at 507. Thus, by requiring unambiguous evidence of congressional intent to confer significant authority upon an agency, the clear statement rule furthers the fundamental policy underlying the nondelegation doctrine—"ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring).

b. The Court has also recognized that decisions curtailing constitutional liberties are not the only types of "important choices of social policy" that should be made by Congress rather than an agency. As a result, the Court has utilized clear statement principles to resolve challenges to agency efforts to impose significant regulatory compliance costs on entire industries or to exercise unprecedented powers over American businesses.

In cases dealing with administrative costs imposed on the cable television industry and the natural gas industry by federal agencies, for example, the Court has held that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (summarizing *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336 (1974), and *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974)). The Court adopted this clear statement requirement, in part, because the power to impose costs on a regulated industry carries with it the possibility that an agency would use that power to penalize those with whom it disagrees or to impose enormous

economic burdens on the members of that industry. *See National Cable Television Ass'n*, 415 U.S. at 340-42.

Likewise, a plurality of the Court has also recognized that "[i]n the absence of a clear mandate in the [enabling] Act, it is unreasonable to assume that Congress intended to give [an agency] . . . unprecedented power over American industry" or the "power to impose enormous costs" on businesses. *Benzene*, 448 U.S. at 645 (plurality opinion). Accordingly, adopting a clear statement requirement is also an appropriate method of constraining agency efforts to regulate businesses in an unprecedented manner or in a manner that imposes significant regulatory compliance costs on those businesses.

2. The Court has adopted clear statement rules in other areas of the law in response to two principal concerns. First, the Court has required a clear statement of congressional intent in a variety of circumstances to ensure that Congress has explicitly considered the important policy question at issue in the case. As noted above, the nondelegation doctrine also reflects an effort by the Court to ensure that Congress fulfills its constitutional role as a policymaker. Second, in cases involving federal legislation in areas that are traditionally the concern of the states, the Court has adopted a clear statement rule to preserve separation of powers principles that are otherwise difficult to enforce judicially. Like the federalism principles embodied in the Tenth Amendment, the separation of powers principles giving rise to the nondelegation doctrine are not always readily enforceable by the federal courts. Thus, because the concerns that led the Court to adopt clear statement rules in other contexts are also present in the nondelegation context, a

clear statement rule like the one described above should be adopted as part of the nondelegation doctrine.

a. The Court has frequently required Congress to indicate clearly that it intends to alter the balance of power between the federal and state governments through federal legislation. *See, e.g., Gregory* v. *Ashcroft*, 501 U.S. 452, 459-60 (1991) (requiring a clear statement of congressional intent to legislate in "areas traditionally regulated by the States"); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985) (requiring a clear statement of congressional intent to override a State's Eleventh Amendment immunity); *United States* v. *Bass*, 404 U.S. 336 (1971) (requiring a clear statement of intent to transform misconduct that has traditionally been prosecuted by the States into a federal crime). This clear statement rule requires Congress to consider important issues of federalism and separation of powers in the first instance allows federal courts to avoid deciding constitutional issues unnecessarily: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.

Legislation affecting the division of legislative authority between Congress and the administrative state, like legislation raising federalism concerns, raises equally sensitive separation of powers issues. *See, e.g., Benzene*, 448 U.S. at 673-74 (Rehnquist, J., concurring). Accordingly, just as it has done in the area of federalism, the Court should adopt a clear statement rule as part

of the nondelegation doctrine to ensure that Congress explicitly considers not only "important choices of social policy," but also the constitutional concerns that are implicated by delegating to agencies the authority to make those policy choices. In addition, adopting a clear statement rule would allow federal courts to avoid reaching the sensitive separation of powers issues raised by a delegation of policymaking authority on an important question of national policy in cases where Congress has not already considered those issues in the first instance. *Cf. Kent*, 357 U.S. at 130.

b. The Court has also invoked the constitutional principle that Congress is the government branch responsible for making important policy determinations when imposing a clear statement rule in contexts that do not raise federalism concerns. *See Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991). In *Landgraf*, the Court required a clear statement of congressional intent concerning the retroactivity of federal legislation because "[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments." 511 U.S. at 272-73. Similarly, in *Arabian American Oil*, the Court required a clear statement of congressional intent that a federal law applies extraterritorially in order to assure that Congress has carefully considered the implications of potential conflicts between "our laws and those of other nations." 499 U.S. at 248. Like the rationale for adopting clear statement rules in federalism cases, the

rationale for imposing clear statement rules in other contexts—to ensure that Congress makes fundamental policy decisions—also supports utilizing a clear statement rule as part of the nondelegation doctrine.

c. The Court's decision to impose a clear statement rule in cases involving federal regulation of areas traditionally regulated by the States is based not only on the principle that Congress should make important policy decisions, but also on the Court's recognition that the federalism principles at issue in these cases are not particularly susceptible to judicial enforcement. *See Gregory*, 501 U.S. at 464 (discussing *Garcia* v. *San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985)). In *Gregory*, the Court explicitly justified the clear statement rule on this basis: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. 'To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" 501 U.S. at 464 (quoting Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)).

Like the federalism principles at issue in *Garcia*, the separation of powers principles underlying the nondelegation doctrine are not always susceptible to judicial enforcement. As Justice Scalia has noted, "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts" because "no statute can be entirely precise . . . and . . .

some judgments, even some judgments involving policy considerations, must be left to the officers executing the law." *Mistretta*, 488 U.S. at 415 (dissenting opinion). Accordingly, just as in the context of federal regulation of traditional areas of state concern, the Court should adopt a clear statement rule as part of the nondelegation doctrine to preserve the separation of powers principles underlying that doctrine.

3. Recognizing a clear statement rule as part of the nondelegation doctrine would further preserve the separation of powers principles upon which the doctrine is based by ensuring that agencies do not overstep their constitutional bounds by exercising policymaking authority over significant issues. Four recent examples of agency aggrandizement, including the EPA's action in this case, illustrate the importance of a clear statement rule in maintaining an appropriate separation of constitutional powers between Congress and the administrative state.

a. Recently, the Federal Communications Commission ("FCC") attempted "to make tariff filing optional for all nondominant long distance carriers" based on its interpretation of its statutory authority to "modify" rate-filing requirements. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 220 (1994). These rate filings were "the essential characteristic of [the] rate-regulated [long-distance common carrier] industry." *Id.* at 231. Accordingly, the Court concluded that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission

to 'modify' rate-filing requirements." *Id.* In other words, the Court held that it would not find that the agency had the authority to make such a significant policymaking decision absent a clear statement to that effect from Congress.

b. Similarly, the Food and Drug Administration ("FDA") recently attempted to exercise unprecedented power over the tobacco industry based on its interpretation of its statutory authority to regulate "drugs," "devices," and "combination products." *See FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1296-97 (2000). The Court held that the FDA lacked the authority to regulate the tobacco industry because the underlying statute and tobacco-related legislation demonstrated that Congress had specifically precluded such regulation by the agency. *Id.* at 1315. In supporting this conclusion, the Court also noted that a contrary reading of the relevant statutes would be unreasonable because there was no evidence that Congress had expressly delegated the sweeping authority over the tobacco industry claimed by the FDA. *See id.* at 1314-15 (explaining that deference to agency interpretations of ambiguous statutes is premised on a theory of implied delegation that is not always consistent with congressional intent). Specifically, the Court stated that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 1315. Thus, by rejecting the FDA's effort to assume unprecedented power over an industry absent a clear statement from Congress delegating to it that authority, the Court recognized that a clear statement rule plays a crucial role in constraining

agency behavior and enforcing the principles underlying the nondelegation doctrine.

c. The recently proposed rule by the Securities and Exchange Commission ("SEC") concerning the scope of services provided by accounting firms represents yet another agency effort to exercise unprecedented authority over, and to impose radical regulatory compliance costs on, an entire profession and, indeed, all American businesses serviced by that profession. Just as the FCC and FDA attempted to expand their authority based on their readings of isolated statutory terms, the SEC has attempted to define the statutory requirement that auditors be "independent" in a manner that would give the agency enormous and uncharted power over the accounting profession. *See* 65 Fed. Reg. 43,148 (2000). Specifically, the SEC has stated that it is considering, among other proposals, whether to "limit—or even completely bar—an auditor's provision of non-audit services to audit clients." *Id.* at 43,154. The SEC has also suggested that it has the authority to require an accounting firm "to segregate its audit and non-audit businesses into separate autonomous units" and otherwise demand the restructuring of the accounting industry. *See id.* at 43,173-74.

Not only would these proposed regulations constitute a radical departure from current federal policy concerning the regulation of the accounting profession, they would also impose enormous costs on publicly traded companies and the accounting profession. To begin with, the SEC itself concedes that, at a minimum, approximately 4,100 publicly traded companies would be forced to forgo (or find replacements for) some or all of the non-audit services that are currently provided by

their auditors. *Id.* at 43,185. The proposed restrictions would also force accounting firms to give up the significant revenue that they derive from providing non-audit services to their audit clients. *Ibid.* Most importantly, the proposed regulations could force accounting firms to absorb the considerable costs involved in spinning off or otherwise restructuring their non-auditing services—costs that the SEC pays little or no attention to in its proposed rules. *See ibid.*

If these proposed auditor service regulations were adopted, a clear statement rule could play an important role in evaluating the legitimacy of the SEC's attempted administrative coup. The decision whether to regulate the entire accounting profession in an unprecedented manner that would impose tremendous regulatory compliance costs on the profession, including the restructuring of major accounting firms, is certainly the type of important question of social policy that should be made by Congress rather than an agency. *Cf. Brown & Williamson Tobacco Corp.*, 120 S. Ct. at 1314-15; *MCI Telecommunications Corp.*, 512 U.S. at 231; *Benzene*, 448 U.S. at 645; *National Cable Television Ass'n*, 415 U.S. at 340-42. Thus, it would be appropriate to determine, as a threshold matter, whether Congress has clearly granted the SEC the authority it has claimed.

Under a clear statement rule, the SEC's proposed rules would be invalidated for the same reasons the Court rejected the FDA's tobacco regulations and the FCC's rate-filing requirements. The SEC's enabling legislation does not contain any statement by Congress, much less a clear one, that the SEC has the authority to make significant policy decisions affecting the entire accounting profession. And nowhere in the other provi-

sions of the federal securities laws cited by the SEC in its proposed rule is there a clear statement that the SEC possesses this kind of sweeping regulatory authority over the accounting profession. *See* 65 Fed. Reg. at 43,150 & n.14. Thus, applying a clear statement rule to the SEC's proposed regulations concerning auditor independence would allow a federal court to invalidate those regulations without reaching the constitutional issue of whether the federal securities laws themselves are unconstitutional because they violate the nondelegation doctrine.

d. The EPA's action in this case likewise cannot withstand scrutiny under a clear statement rule. Such a rule should be applied by the Court because, as the court of appeals determined, the EPA has construed its authority under the CAA so broadly that its air quality standards could ruin entire industries and "affect the whole economy." 175 F.3d at 1037. Like the authority claimed by the FCC, the FDA, and the SEC, this is precisely the type of regulatory authority that should be upheld only if clearly and explicitly authorized by Congress. The CAA, however, is devoid of a clear statement that the EPA has the authority to impose unlimited regulatory compliance costs on the businesses that comprise the industrial economy. Indeed, if anything, the text of the statute suggests that the EPA does not have this authority. *See* 42 U.S.C. §§ 7409 (requiring those who advise the Administrator to take into account the economic impact of air quality standards) and 7425 (providing "[m]easures to prevent economic disruption or unemployment" caused by the adoption of certain environmental standards). Since the challenged EPA action was not within the authority clearly and unambiguously granted to the agency by Congress, the Court need not reach the constitutional issue of whether the CAA, as interpreted by the EPA, constitutes an unconstitutional delegation of legislative power to an administrative agency.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
MARK A. PERRY
BRIAN C. GOEBEL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

September 11, 2000

AMICUS CURIAE

BRIEF